

1 QUESTION: I couldn't find what the injury was
2 here but I guess there is something.

3 QUESTION: Well, what about the fact that if they
4 have a place under the old order, they had a place which was
5 their place on the spectrum or whatever it was, and now they
6 are being told that you have to move if somebody comes up
7 with as good a place some place else. And you got to
8 negotiate until you get that but you have to move if that
9 happens.

10 I suppose you could say that the fact that you are
11 forced to enter into that negotiation and forced to move if
12 the other people come up with a comparable facility takes
13 away something, namely your right to just stay where you
14 are. I'm saying that's an argument. I'm not saying you buy
15 it or not but I assume that's their argument.

16 MR. CARR: That's correct, Your Honor, that's a
17 possible argument with respect to standing in terms of there
18 is some sort of injury but--

19 QUESTION: Well, there's certainly transactional
20 costs for the cities, they are substantial, just because of
21 the way the cities operate.

22 MR. CARR: There are transactional costs.

23 QUESTION: To have to undo where they are and redo
24 this, he is--he's got to be right on this, that there are
25 going to be substantial undertaking for these cities.

1 QUESTION: And you don't reimburse, this policy
2 doesn't reimburse transactional costs. You don't pay the
3 salaries of the city people to come and go and negotiate the
4 new facility?

5 MR. CARR: No, I don't believe that would be.

6 QUESTION: You don't require the new spectrum and
7 all of that?

8 MR. CARR: No.

9 QUESTION: The people who are now going to be
10 told, here's what you have to do and no one ever anticipated
11 it. You have got to put this proposal together, it has got
12 to go to the city council, it has got to be negotiated, you
13 got to think about what the alternatives are, etc., etc.,
14 etc.

15 MR. CARR: That's right, because--

16 QUESTION: That's a major undertaking.

17 MR. CARR: The Commission's judgment though is
18 that those burdens would not be enough to disrupt Public
19 Safety Services.

20 QUESTION: No, we understand that, counsel, I
21 understand your position but I'm very troubled, one judge,
22 that nobody in this case explained what the injury was and
23 in Article III terms, you didn't have to say Article III,
24 explain what the injury was. You just sort of assumed it
25 which is not adequate.

1 And I'm dubious as to what the injury is now. If
2 you went back and thought to yourself do we have an injury?
3 Wouldn't you have said, hey, there's not even an injury in
4 this case. It's a little late now.

5 MR. CARR: I understand that.

6 QUESTION: But it certainly troubles me. There
7 may be transactional costs, I don't know what the devil they
8 are.

9 QUESTION: Why did the Commission assume in the
10 first place if there was nothing involved with moving them,
11 why did they give them an exemption in the first place?
12 Obviously thought there was a gain.

13 MR. CARR: Quite frankly, Your Honor, it's not
14 entirely clear. When the Commission--

15 QUESTION: What about the monopoly rents argument
16 or question I raised, did you follow that?

17 Did you understand what I was talking about?

18 MR. CARR: By monopoly rents, I'm sorry, Your
19 Honor--

20 QUESTION: You didn't? That's an economic term,
21 and the point is that if they have a place on the spectrum
22 which the Government has awarded them and somebody else
23 wants it and even if they are entitled to exactly comparable
24 space from their point of view, in another spot, they want
25 to be in a position to charge the new person a fee or a

1 cost, something for moving. Now, that's called a monopoly
2 rent.

3 MR. CARR: Right.

4 QUESTION: Which under the FCC would not be, in my
5 judgment, entitled to award them. Not clearly entitled
6 anyway. It wouldn't be in the public interest. But that's
7 something that very rationally they might want.

8 MR. CARR: That's true and it is still something
9 that under the transition plan they could negotiate before
10 they got to the point of mandatory relocation.

11 QUESTION: Counsel, I'm afraid you're not with me
12 on this, because I'm suggesting that it wouldn't even be
13 legitimate for the FCC to recognize that, if it were true.
14 Although that may be their underlying rationale of what they
15 really--you are absolutely right. There's got to be some
16 reason why they're fighting, some reason why they're
17 litigating. But it may not be an injury which is
18 recognizable under this statute.

19 MR. CARR: I think that is correct, Your Honor.

20 QUESTION: Which means they wouldn't have
21 prudential standing even if they had Article III standing.

22 QUESTION: So if I follow this conversation it is
23 that you think, you don't know, maybe transactional costs,
24 you know, the move might be covered but if somebody says, by
25 God, I got this spot and you're going to pay through the

1 teeth to get this spot. Since the Government originally
2 gave you that spot to begin with that wouldn't be a
3 legitimate--

4 MR. CARR: No. Well, they're clearly not entitled
5 to that spot on the spectrum and--

6 QUESTION: I just wanted to make sure I understood
7 it.

8 MR. CARR: --and now, of course, there are these
9 negotiation periods before mandatory relocation--

10 QUESTION: I understand.

11 MR. CARR: --comes into play where the parties can
12 negotiate their own deal.

13 QUESTION: Well, why don't you put the PCS
14 operator some place else.

15 MR. CARR: Well, that's a good question, Your
16 Honor, I think if you review the OET study it explains the
17 difficulties with putting the PCS providers at any other
18 point in the spectrum. This was regarded as the best
19 spectrum that was--

20 QUESTION: Why is it the best?

21 MR. CARR: Well, if it was a question of putting
22 the PCS providers above the three gigahertz bands, for
23 example, the places where the Public Safety incumbents and
24 the other incumbents would be relocated, it's my
25 understanding that those frequencies are simply not good for

1 mobile communications operations. And that's detailed in
2 the--

3 QUESTION: You mean, technologically?

4 MR. CARR: That's correct. And OET pointed that
5 out in its study when it created the or proposed the
6 creation of these bands.

7 QUESTION: And there's no loss in technological
8 quality in shifting the Public Service from one band to
9 another, it's exactly the same?

10 MR. CARR: No. And under the transition plan the
11 facilities will be equal to or comparable.

12 QUESTION: Well, that's the whole point. I mean
13 that's what this fight is--

14 MR. CARR: Yes, that's correct.

15 QUESTION: I mean I'm perplexed at your hesitation
16 in answering Judge Silberman. There's no confusion over
17 what's at stake here. They are on a band that works. It's
18 clear that the quality is there. You are now saying we're
19 going to move you and we're not entirely sure where and some
20 of them are going to be suspect. That's exactly what's,
21 apart from the transactional costs, that's what's at issue
22 here.

23 MR. CARR: Fair enough. They may be suspect about
24 it, but under the FCC's rules they are guaranteed
25 facilities--

1 QUESTION: I understand how you are addressing
2 that but that's the problem is you are taking them off a
3 band that clearly works technologically. And there's no
4 guarantee that--

5 MR. CARR: There's no question about that.

6 QUESTION: Okay. There's no guarantee, indeed,
7 because of the way you answer it, there's no guarantee that
8 they will find comparable technological quality elsewhere.
9 And if they don't, they won't be made to move.

10 MR. CARR: That's correct.

11 QUESTION: Well, that's the potential injury here,
12 that's why they don't want to move, they know what they've
13 got.

14 QUESTION: Would you like to hire Judge Edwards?

15 [Laughter.]

16 MR. LANE: Actually he was happy with you.

17 [Laughter.]

18 MR. CARR: I'm actually happy with both of you
19 this morning, Your Honors.

20 QUESTION: Are you familiar, speaking of changing
21 your mind, are you familiar with the famous libel case of
22 this Court a couple of years ago when--

23 QUESTION: I was amazed he didn't cite it.

24 QUESTION: Yes. Why didn't you cite it? That's
25 another dereliction of duty. There's a famous libel case in

1 which the panel sua sponde, there was a petition for
2 rehearing.

3 MR. CARR: The Moldea case, you're referring to,
4 Your Honor, is that correct?

5 QUESTION: Well-known jurists on this circuit
6 changed their minds.

7 MR. CARR: Yes. Well--

8 QUESTION: Two very prominent jurists changed
9 their mind.

10 MR. CARR: I didn't want to raise a sore subject.

11 QUESTION: Why is it sore? They should be proud
12 of it. Why shouldn't you try getting under their umbrella?

13 QUESTION: You filed petitions for rehearing 100
14 times a year asking us to change our minds, not a 100 times,
15 but several times a year asking us to change so I assume you
16 want us to on the appropriate occasion.

17 MR. CARR: Well, that's certainly correct, Your
18 Honor, and I think the Commission would take the view that
19 it can also change its mind when its looking particularly at
20 an area of very technical matter within its own expertise
21 and a new area involving a new communication service.

22 QUESTION: Well, I mean you can get away with that
23 to an extent as long as there are another couple of
24 sentences there.

25 MR. CARR: Sure. And we feel that that's there in

1 this order. That we feel we have identified the comments in
2 the record.

3 QUESTION: One last question I have for you is
4 what is this, I guess I didn't pay enough attention to it in
5 the record, there's rulemaking in process which will cut
6 down on some of these protections that you give them or not?
7 I just picked that up from Mr. Lane's argument.

8 MR. CARR: There is a rulemaking currently where
9 there are some proposed rules that could have some impact on
10 the relocation.

11 QUESTION: When you say, could have impact, just
12 sort of bottom line, do they lessen the protections for the
13 movant, for the person who is going to have to move?

14 MR. CARR: Well, they do not change the bottom
15 line which is that the facilities to which they move--

16 QUESTION: Must be comparable.

17 MR. CARR: --will be equal to what they, to some
18 extent, what they do is they require that any of the
19 technological studies that the cities do in the course of
20 moving will be negotiated first with the PCS provider. So
21 that they won't go out and get these expensive studies done
22 and then--

23 QUESTION: Put in the bill for them, yes, okay.

24 MR. CARR: Exactly.

25 QUESTION: All right.

1 MR. CARR: I think it's really, at this point,
2 none of those rules have been adopted. The comments have
3 been submitted.

4 QUESTION: I understand.

5 MR. CARR: And that the matter is pending.

6 QUESTION: Okay.

7 THE COURT: Okay, your time is up, thank you.

8 MR. CARR: Thank you, Your Honors.

9 THE COURT: Two minutes, Mr. Lane, that's it.

10 ORAL ARGUMENT OF JOHN D. LANE, ESQ.

11 ON BEHALF OF PETITIONERS--REBUTTAL

12 MR. LANE: Thank you, Your Honor.

13 Counsel for the Commission referred to, when he
14 was pressed by the Court, as to where it is in the record
15 that there was evidence that would lead the Commission and
16 justify the Commission for making this radical change of
17 mind and he mentioned the Apple comments in which they said
18 they couldn't live with--because there are nomadic devices--
19 they couldn't live with another user on the same band.

20 But the Commission took care of that in their
21 third report and order. They said that they would cut them
22 down to a band that is only 20 megahertz wide and there's
23 very little Public Safety--

24 QUESTION: That's a fair point, counsel. The only
25 things that come in post the third R & O are APC and Cox.

1 And although you're absolutely right APC and Cox don't
2 disagree with the resolution that the FCC reached, they do
3 raise the point that the FCC looks at and becomes troubled
4 about. They do raise the point that there may not be room
5 for both at that other end of the spectrum.

6 And so, if you are conscientious as an agency and
7 you look at this and you say, you know, we might have been
8 wrong about that. What's wrong with the agency coming back
9 and saying, you know, I think we under-sold this problem and
10 it's enough to tip the balance and besides, there's very
11 little that we can see that's really at stake for your
12 clients, other than the fact that they do have a lot of
13 political clout.

14 MR. LANE: Well, I don't know about that. But--

15 QUESTION: Oh, I know.

16 THE COURT: But, nevertheless, we don't take the
17 position that the Commission can't change its mind,
18 particularly when they are dealing with scientific and
19 matters of future prediction. All we are saying is they
20 have to have a valid record before them, something
21 intervened in this case that changed their minds, and
22 something hit the Commissioners minds. We can't find it in
23 the record.

24 QUESTION: You are not suggesting, in Watergate
25 terms, a nefarious force, are you?

1 MR. LANE: No. I'm saying that something changed
2 their mind. There's not enough in the record, there are no
3 studies, there are no staff recommendations or anything
4 that--whatever it is, we should have a shot at it and we
5 should be able to test that.

6 QUESTION: Were the Commissioners the same in both
7 proceedings?

8 MR. LANE: No, there was a change. There was a
9 change in the leadership, in the chairmanship.

10 QUESTION: Yes, okay.

11 MR. LANE: And the new chairman is one who took
12 maybe a slightly different view. And see, the original
13 scheme was to leave it to the market place in this voluntary
14 period and if someone could get a monopoly, a kicker in
15 there, fine, that was the Commission's scheme. But when
16 they get down to the point, the point I was making is

17 QUESTION: You have got to finish up, counsel.

18 MR. LANE: Yes. There either is something there
19 and we ought to be able to test it or if there isn't, it is
20 clearly arbitrary and capricious.

21 Thank you.

22 QUESTION: Thank you, the case is submitted.

23 [Whereupon, the above-entitled case was
24 submitted.]